85-1673

SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-

ROBERT GORDON MILLER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE HORRY COUNTY COURT OF GENERAL SESSIONS

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QUESTION PRESENTED

FOLLOWING A SUCCESSFUL PROSECUTION APPEAL OF A POST-VERDICT JUDGMENT OF ACQUITTAL, DOES THE DOUBLE JEOPARDY CLAUSE BAR THE STATE FROM FORCING PETITIONER TO UNDERGO A CAPITAL SENTENCING PROCEEDING BEFORE A NEWLY-EMPANELED JURY?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CITATION TO OPINION BELOW 1

JURISDICTION. 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW 14

REASONS FOR GRANTING THE WRIT 15

CONCLUSION 25

APPENDIX

Order of the Horry County Court of General Sessions, January 17, 1985 . . . . . A-1

Order of the Supreme Court of South Carolina denying stay and dismissing petitioner's double jeopardy appeal as interlocutory, February 11, 1986. . . . . A-5

TABLE OF AUTHORITIES

CASES	Page
Arizona v. Rumsey, 467 U.S. 203 (1984)	14, 16, 20, 21
Bullington v. Missouri, 451 U.S. 430 (1981)	14, 16, 20, 21
Gregg v. Georgia, 428 U.S. 153 (1976)	5
State v. Miller, ___ S.C. ___, 337 S.E.2d 883 (1985)	8, 10, 11, 12
State v. Shaw, 273 S.C. 194, 255 S.E.2d 799, cert. denied, 444 U.S. 1027 (1979)	5
United States v. Scott, 437 U.S. 82 (1978)	15, 23
United States v. Wilson, 420 U.S. 332 (1975)	17, 20, 22
Zant v. Stephens, 462 U.S. 862 (1983)	5

STATUTES	
28 U.S.C. §1257(3)	2
S.C. Code §16-3-20 (1984 Cum. Supp.)	3, 4, 5, 12

IN THE

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October Term, 1985

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v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE HORRY COUNTY COURT OF GENERAL SESSIONS

Petitioner Robert Gordon Miller prays that a writ of certiorari issue to review the judgment of the Horry County Court of General Sessions in this case.

CITATION TO OPINIONS BELOW

The order of the Horry County Court of General Sessions is unreported, and is reproduced in the Appendix to this petition

at A-1 to A-4. The per curiam order of the Supreme Court of South Carolina dated February 11, 1986, denying petitioner's request for stay and dismissing his appeal is as yet unreported, and is reproduced in the Appendix to this petition at A-5 to A-9.

JURISDICTION

The order of the Supreme Court of South Carolina dismissing petitioner's pretrial appeal as interlocutory was entered on February 11, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides in pertinent part that "[n]o person

shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . ."

It further involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

It further involves S.C. Code §16-3-20 (1984 Cum. Supp.), which provides in pertinent part:

> §16-3-20 (A) A person who is convicted or pleads guilty to murder shall be punished by death or by imprisonment for life . . .
>
> (B) Upon conviction . . . of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or to life imprisonment. . . . In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of punishment. . . .

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider . . . any of the following statutory aggravating . . . circumstances which may be supported by the evidence:

(1) Murder was committed while in the commission of the following crimes or acts: . . . (c) kidnapping . . . (f) larceny with the use of a deadly weapon, (g) housebreaking . . .

* * * *

The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all the members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. . . . Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. . . .

STATEMENT OF THE CASE

The petitioner Robert Gordon Miller was tried in a South Carolina state court on an indictment charging him with murder, housebreaking and larceny. Prior to trial, the prosecution served notice that it intended to seek the death penalty in the event that Miller was found guilty. In its notice, the state alleged that the murder of the victim had been committed "while in the commission of Housebreaking, Kidnapping and Larceny with the use of a Deadly Weapon."[1]

---

[1]This notice apprised Miller that the state's demand for the death penalty would rely on three of the statutory aggravating circumstances specified in S.C. Code §16-3-20(C)(a)(1) (1984 Cum. Supp.). South Carolina's capital sentencing statutory scheme, which is in all material respects identical to the Georgia statute considered by this Court in Gregg v. Georgia, 428 U.S. 153 (1976) and Zant v. Stephens, 462 U.S. 862 (1983), requires that at least one statutory aggravating circumstance be shown to exist beyond a reasonable doubt before the sentencing jury may consider imposition of the death penalty. State v. Shaw, 273 S.C. 194, 255 S.E.2d 799,

As summarized by the South Carolina Supreme Court, the state's evidence presented at trial established the following:

> On Sunday, October 9, 1983, at 8:00 a.m., [Miller] rented a Ryder truck in Myrtle Beach. The truck had Arkansas Licence plates, which are yellow with black letters. Miller was employed by a Myrtle Beach furniture company, Resort Designs. Resort Designs was closed on Sunday, and there was evidence the warehouse had been locked since Friday.
>
> At 9:00 a.m., the victim, Guy Patrick McLean, was last seen alive leaving his home in a blue Lincoln. He owned the building which housed Resort Design's warehouse. The Lincoln was seen at the warehouse at approximately 10:30 a.m.
>
> At 12:00 noon, a car wash attendant in Rowland, North Carolina, some 80 miles from Myrtle Beach, was opening his car wash for the day. When he arrived, he observed a Ryder truck in one of the closed stalls. A white male in his early 20's was rinsing something red out of the truck. At trial, the attendant testified that the truck was like the truck

---

cert. denied, 444 U.S. 1027 (1979).

rented by [Miller]. He said the driver of the truck seemed anxious and nervous. Though the attendant was unable to recall the license number, he did remember the plates were yellow or gold with green or dark letters. He also saw furniture in the truck.

The truck hurriedly left the stall. . . The attendant called the Rowland police. The Chief of Police found something red in the stall, and immediately began searching for the truck.

Between 12:00 noon and 2:00 p.m., respondent delivered several pieces of furniture to Earl Cummings. Cummings lived 8-10 miles from Rowland. The furniture was later identified as having been delivered to Resort Designs the prior week, and was valued at approximately Two Thousand ($2000.00) Dollars. Miller had not purchased the furniture from Resort Designs. Cummings paid Miller $250.00 cash and $350.00 of "something else." Cummings placed one sofa in a back room. He never used, nor unwrapped it.

At 3:30 p.m., McLean's daughter came to the warehouse. She found the abandoned Lincoln and saw something red on the loading dock. The police were called. They found pools of Type A blood on the loading dock, and a 1 x 4

board with gray hairs on it. Several of McLean's personal effects were also found.

Sometime after 10:00 p.m., [Miller] returned to the closed rental lot. He left the truck, never returning to claim his $100.00 deposit. The odometer showed the truck travelled 208 miles.

The following morning, October 10, a fire was seen at a trash dump near Miller's father's farm in Dillon. Dillon is between Rowland and Myrtle Beach. A round trip between Myrtle Beach and Rowland is approximately 190 miles. On Friday, October 14, the charred remains of McLean were found at the same trash dump. Investigators also found more of the victim's personal effects. An autopsy showed McLean had died from a crushing blow to the skull. Medical records revealed he had Type A blood.

The case remained under investigation. Almost a year later, in September 1984, SLED agents examined the sofa in Cummings' house. It was still wrapped, and Cummings stated it had not been disturbed since Miller delivered it. Type A blood stains were found on the bottom of the sofa.

State v. Miller, ___ S.C. ___, 337 S.E.2d

883, 884-885 (1985).

After this evidence had been presented, Miller moved for a directed verdict of acquittal on the grounds that the state had failed to present sufficient evidence placing him at the scene of the crime. The trial judge took the motion under advisement, stating that he was not denying the motion but would submit the question of Miller's guilt or innocence to the jury. State v. Miller, supra, Transcript of Record (hereinafter cited as "Tr.") at 450-451. The jury convicted Miller as charged, whereupon the trial judge granted Miller's motion for a judgment of acquittal notwithstanding the verdict, and ordered him discharged from custody. The judge announced his ruling by stating to the jury,

> I think the defendant was entitled to a directed verdict at the close of the State's case. . . . I find that there was no evidence

> that the accused was at the scene of the crime. There being no such evidence, it was incumbent upon me to have directed a verdict of not guilty. . . . I could not live with myself if I let the verdict stand, because as I see it the State did not prove he was there . . . . I feel I have erred in giving you this case.

The judge concluded,

> The motion of the defendant having been considered in regard to the lack of evidence for the conviction, I do not believe the state has met the burden of proving any of the elements in any of the these charges. On these charges the defendant is found not guilty, and he is released from custody as to these charges.

State v. Miller, supra, Transcript of Record at 459-462.

The state appealed this judgment of acquittal to the South Carolina Supreme Court, which on November 10, 1985, reversed the trial judge as to the murder and larceny counts and reinstated the jury's guilty verdicts. While the state supreme court

indicated in a footnote that the trial judge had committed a procedural error by granting a judgment of acquittal after the jury's verdicts of guilty,[2] the basis of its judgment was its conclusion, based on a review of the evidence presented at trial, that the evidence did support the convictions for murder and grand larceny. The state supreme court agreed with the trial judge that the prosecution had introduced no evidence to support the charge of housebreaking, and affirmed the entry of a judgment of acquittal on that count.

---

[2]The court stated that the trial judge's power after the rendering of a guilty verdict was limited to the granting of a new trial. It further held that by submitted the case to the jury, the trial judge had impliedly denied Miller's earlier motion of a directed verdict of acquittal--even though the trial judge expressly stated prior to submitting the case to the jury that he was not denying the defendant's motion for a directed verdict, but was taking it under advisement. State v. Miller, supra, 337 S.E.2d at 884, n. 1.

Having reinstated the murder and larceny convictions, the court ordered the case remanded for sentencing pursuant to S.C. Code §16-3-20 (1984 Cum. Supp.). State v. Miller, ___ S.C. ___, 337 S.E.2d 883 (1985).

Miller petitioned for rehearing upon the grounds, inter alia, that in view of his earlier acquittal by the trial court, the capital sentencing proceeding contemplated by the South Carolina Supreme Court's remand order was barred by Double Jeopardy principles. The state supreme court denied Miller's rehearing petition in an unpublished opinion which did not discuss his double jeopardy claim. Subsequently, Miller moved before the trial court for an order staying the sentencing proceeding and dismissing the state's notice of intent to seek the

death penalty on double jeopardy grounds.[3] The trial court denied the motion in a written order which is reproduced in the Appendix to this petition. Miller appealed this order to the South Carolina Supreme Court, which on February 11, 1986, dismissed his appeal as interlocutory. In so ruling, the state supreme court noted that the appeal was dismissed "without prejudice to [Miller's]

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[3]Petitioner originally moved in the trial court only for an order staying the sentencing proceeding until the filing and disposition of a petition for writ of certiorari in this Court. During the course of argument on the motion, however, petitioner acknowledged some uncertainty as to whether the state supreme court's earlier denial of his petition for rehearing constituted a determination of the merits of his double jeopardy claim. Ultimately, the trial judge was requested to and did rule on the double jeopardy claim itself, and denied both the claim and the request for a stay. The sentencing hearing was eventually temporarily stayed by the South Carolina Supreme Court prior to its dismissal of petitioner's appeal, and the hearing has not been rescheduled pending consideration of the present petition by this Court.

right to raise these issues on appeal from final judgment," and added that "[w]e express no opinion on the merits of [Miller's] double jeopardy claim." Infra at App. A-9.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Miller first raised his double jeopardy claim in a petition for rehearing following the South Carolina Supreme Court's decision reinstating his conviction and ordering a capital sentencing hearing in the trial court. In that petition, Miller argued that such a sentencing hearing could not be held without violating the double jeopardy principles of Bullington v. Missouri, 451 U.S. 430 (1981). After denial of this petition, Miller renewed his double jeopardy claim in the trial court, again asserting that under the principles of Bullington, his prior

acquittal barred the state from relitigating the factual issue of his guilt of murder with aggravating circumstances in a capital sentencing proceeding. The trial court addressed his federal constitutional double jeopardy claim on the merits in a written order, infra at A-2 to A-4, and the South Carolina Supreme Court dismissed his appeal from that order as interlocutory.

REASONS FOR GRANTING THE WRIT

This case lies at the juncture of two lines of double jeopardy doctrine. The first is the principle that the prosecution may not subject a defendant to a second trial following an erroneous judgment of acquittal, where that acquittal was based upon the jury or judge's belief that the evidence was insufficient to convict. United States v. Scott, 437 U.S. 82, 91 (1978). And the second is this Court's

recognition, in Bullington v. Missouri, 451 U.S. 430 (1981) and Arizona v. Rumsey, 467 U.S. 203 (1984), that the sentencing hearing of a bifurcated capital trial is, for double jeopardy purposes, the equivalent of a trial. For the reasons that follow, petitioner submits that to require him to undergo a capital sentencing hearing for a murder of which he was previously acquitted by the trial judge would force him to defend a second time against the same charges, in violation of the double jeopardy clause.

In this case, the state sought to prove that petitioner was guilty of murdering Guy McLean while stealing furniture from Mr. McLean's warehouse. The trial judge ruled that the state had failed to present any evidence showing petitioner to have been at the scene of the murder and larceny, and

ordered him acquitted. On appeal, the South Carolina Supreme Court held that this acquittal was erroneous and reinstated the murder and larceny verdicts.

Had the state supreme court done no more than this, and remanded the case for imposition of a sentence other than death, petitioner would concede for present purposes that this case would be controlled by United States v. Wilson, 420 U.S. 332 (1975). In Wilson, the Court held that where "reversal on appeal would merely reinstate the jury's [guilty] verdict" and would not "expose the defendant to the risk of a second trial after the finder of fact had ruled in his favor in the first," such a reversal on appeal would not offend double jeopardy principles. 420 U.S. at 345, 347. But the state supreme court's remand order requires more than a mere reinstatement of the

jury's original verdict. For in order to sentence petitioner under S.C. Code §16-3-20 (1984 Cum. Supp.), as the trial court here is required to do by the state supreme court, it will be obligated to empanel a new jury and allow the state to attempt to persuade that jury that petitioner committed the murder of the victim "while in the commission of the offense of larceny with the use of a deadly weapon." In short, petitioner's sentencing hearing will constitute an opportunity for the state to attempt to establish petitioner's factual guilt of the very crime of which the trial judge acquitted him at his original trial.

Moreover, should the state succeed in that effort and obtain a jury recommendation of death, the prosecution would further be required to persuade the trial judge that, inter alia, "the death penalty was warranted

under the evidence of the case" in order to be entitled to imposition of a death sentence. S.C. Code §16-3-20(C). This, of course, is a factual determination which the trial judge at petitioner's first trial implicitly resolved in favor of the defense when he ordered petitioner acquitted on all charges. Since the original trial judge will not be presiding at petitioner's sentencing hearing, however, the prosecution is to be presented with a fresh opportunity to persuade a new judge of the sufficiency of evidence which the original trial judge found lacking.

Thus the impending sentencing proceeding in this case will provide the prosecution with two additional opportunities to prove to a newly-selected jury and to a new trial judge the very same factual allegations of which petitioner was acquitted--albeit erroneously--by the trial judge at peti-

tioner's original trial. For this reason it can scarcely be asserted that the state supreme court's remand in this case, like that involved in United States v. Wilson, 420 U.S. 332 (1975), "simply order[ed] the jury's verdict reinstated." As the Court explained in Arizona v. Rumsey, 467 U.S. 203 (1984), the crucial feature of the government's appeal in Wilson was that reinstatement of the guilty verdict in that case required no new factfinding; "the defendant in Wilson was not to be subjected to a second trial after an acquittal at his first." 467 U.S. at 212. In this case, by contrast, the South Carolina Supreme Court's remand order requires a sentencing hearing which is constitutionally like a trial for double jeopardy purposes, Arizona v. Rumsey, supra, Bullington v. Missouri, 451 U.S. 430 (1981), and which will afford the state

another opportunity to convict petitioner of charges of which he has been once acquitted.

In denying petitioner's double jeopardy motion, the sentencing trial judge relied on the fact that here, unlike in Bullington and Rumsey, the defendant has not yet undergone a sentencing hearing, and thus has not been formally "acquitted" of the death penalty. This distinction cannot, however, support a different result than was reached by the Court in those cases. Here, the trial judge acquitted petitioner of every charge relating to the murder of Guy McLean, discharged the jury which would have determined petitioner's sentence had he been convicted of murder, and ordered petitioner released from custody. By so doing, the trial judge necessarily acquitted petitioner of every fact required to support imposition of a death sentence. The fact that petitioner

has not yet undergone a sentencing hearing as such in no way diminishes the effect of the prior acquittal on the issues which would have been determined at such a sentencing proceeding. Having been acquitted on each of these issues by the trial judge, the prosecution should not be permitted to require petitioner to defend against a second attempt to persuade a second jury and a second judge that he committed murder while in the commission of larceny. Even if, under United States v. Wilson, supra, the prosecution is entitled to reinstatement of the guilty verdict against petitioner, it is not entitled to resume its prosecution of petitioner by the trial-like proceeding required by South Carolina's capital sentencing statutes.

Petitioner does not, of course, assert that any relitigation of factual issues at

a capital sentencing proceeding implicates the double jeopardy clause. Where a defendant is convicted of murder or of related offenses constituting the statutory aggravating circumstances alleged by the prosecution, double jeopardy principles obviously pose no bar to the re-establishment of these offenses at the sentencing phase. But the situation is entirely different when the trial is terminated--even erroneously--by an acquittal based on a factual determination that the state's evidence was insufficient to convict. Under such circumstances, it is petitioner's submission that the double jeopardy clause permits reinstatement of the guilty verdicts only if, and to the extent that, no new factual determinations respecting the defendant's guilt or innocence need be made in new trial proceedings. United States v. Scott, 437 U.S. 82, 90-91 (1978). Accordingly,

petitioner requests that the Court grant his petition for a writ of certiorari to consider whether South Carolina may force him to undergo a second trial on the issue of sentence after his first trial was terminated in a judgment of acquittal.

CONCLUSION

For the foregoing reasons, petitioner submits that the writ should be granted.

Respectfully submitted,

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April 14, 1986

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IN THE

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October Term, 1985

No. 85-

ROBERT GORDON MILLER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE HORRY COUNTY COURT OF GENERAL SESSIONS

A P P E N D I X

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

vs.

ROBERT GORDON MILLER,

DEFENDANT.

This matter came to be heard before me on the 16th day of January, 1986 pursuant to a Motion for Stay by the Defendant and Reply to Motion for Stay by the State, both of which are attached hereto and incorporated herein by reference.

The Defendant was present in Court and represented by Kaye Gorenflo Hearn, George Hearn and Robert N. Richardson. The State of South Carolina was represented by Jim Dunn, Solicitor for the Fifteenth Judicial Circuit.

The Petitioner/Defendant argued, by and through his attorneys, that it would constitute double jeopardy for the State to be allowed to seek imposition of the death penalty at a sentencing proceeding now scheduled to be heard February 3, 1986. The Petitioner/Defendant argues that the Court's only viable alternative to double jeopardy is the imposition of a life sentence, citing Bullington v. Missouri, 451 U.S. 430, 68 LEd 2d 270, 101 S Ct 1852 (1981) and Arizona v. Rumsey, ___ U.S. ___, 104 S Ct ___, 81 L ed 2d 164 (1984).

I have considered both the Bullington and Rumsey cases and find that in both cases the Defendants were found guilty in their original trials and underwent a sentencing proceeding in a bifurcated trial wherein a life sentence was imposed. Thereafter, upon retrial the Defendant

Rumsey received the death penalty and in Bullington the State Supreme Court issued a Writ allowing the State to seek the death penalty. In both cases the United States Supreme Court held that the second sentencing proceeding violated the double jeopardy clause of the United States Constitution. The case before this Court is readily distinguishable in that the Defendant Robert Gordon Miller, at this point, stands convicted of murder and larceny, no sentencing proceeding has been conducted and he has not been sentenced.

It appears to this Court, and I find as a fact, that the State's proceeding with the sentencing phase of this trial would not violate the double jeopardy provisions of either the Constitution of the United States or the Constitution of the State of South Carolina. I further find as a fact that

an Order staying the sentencing phase of this trial scheduled to be heard on February 3, 1986 would be inappropriate. Now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that the sentencing proceeding against the Defendant Robert Gordon Miller does not and will not constitute double jeopardy and the request for a stay of the proceedings scheduled for February 3, 1986 is hereby denied.

AND IT IS SO ORDERED.

s/Sidney T. Floyd
SIDNEY T. FLOYD, PRESIDING JUDGE
FIFTEENTH JUDICIAL CIRCUIT

Conway, South Carolina

January 16, 1986

THE STATE OF SOUTH CAROLINA

The State,

Respondent,

v.

Robert Gordon Miller,

Appellant.

O R D E R

Appellant moves for a stay of proceedings in the trial court pending disposition of this appeal. The State moves to dismiss the appeal. The motion for stay is denied and the appeal is dismissed.

Appellant was convicted by a jury of murder, grand larceny and housebreaking. The trial judge granted appellant's motion for judgment notwithstanding the verdict. The State appealed, and this Court reversed the trial judge's grant of judgment n.o.v.

and reinstated the verdicts of guilty on the charges of murder and grand larceny. The Court upheld the dismissal of the housebreaking conviction, and the case was remanded for sentencing. State v. Miller, ___ S.C. ___, 337 S.E.2d 883 (1985).

On remand, appellant moved to bar the capital sentencing proceeding on double jeopardy grounds. The trial judge denied the motion and this appeal followed.

In South Carolina, a criminal defendant may not appeal until sentence has been imposed. Parsons v. State, Order dated January 9, 1986; State v. Washington, ___ S.C. ___, 330 S.E.2d 289 (1985).[1] Consistent

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[1]See, e.g., State v. Robinson, ___ S.C. ___, 337 S.E.2d 204 (1985 [trial in absence, appeal prior to sentence]; State v. Dingle, 279 S.C. 278, 306 S.E.2d 223 (1983) [order committing defendant to Department of Mental Health]; State v. Hubbard, 277 S.C. 568, 290 S.E.2d 817 (1982) [denial of motion to suppress evidence]; State v. Parker, 267 S.C. 317, 227 S.E.2d 677 (1976)

with this rule, an order denying a double jeopardy claim is not immediately appealable. State v. Wyatt, 115 S.C. 325, 105 S.E. 704 (1921); State v. Hill, 74 S.C. 415, 54 S.E. 614 (1906); State v. Timmons, 68 S.C. 258, 47 S.E. 140 (1904); State v. Hughes, 56 S.C. 540, 35 S.E. 214 (1900).

Appellant, however, argues that this rule has been overruled by federal decisions which hold that appeals on double jeopardy

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[denial of motion to quash indictment]; Ex parte Murray, 261 S.C. 255, 199 S.E.2d 718 (1973) [adjudication of delinquency, but withholding disposition]; State v. McMillan, 189 S.C. 444, 1 S.E.2d 626 (1939) [denial of motion to quash indictment]; State v. Gellis, 158 S.C. 471, 155 S.E. 849 (1930) [overruling demurrer to an indictment]; State v.Turner, 118 S.C.383, 110 S.E. 525, (1922) [denial of motion to quash indictment]; State v. Mason, 54 S.C. 240, 32 S.E.357, (1899) [denial of motion to quash indictment]; State v., 52 S.C. 284, 28 S.E.937, (1898) [denial of plea in abatement]; State v. Hightower, 33 S.C. 598, 11 S.E. 597, (1890) [appeal prior to imposition of sealed sentence]; State v. McKettrick, 13 S.C. 439 (1880) [appeal after conviction, trial judge refused to sentence].

grounds involve final judgments that are directly appealable. Richardson v. United States, ___ U.S. ___, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984); Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

There is no federal constitutional right to appellate review of a criminal conviction. Abney v. United States, supra; Estelle v. Dorrough, 420 U.S. 534, 95 S.Ct. 1173, 43 L.Ed.2d 377 (1975). In both state and federal courts, the right to appeal a criminal conviction is conferred by statute. S.C. Code §14-3-330 (1976); 28 U.S.C. §1291. In order to exercise his statutory right to appeal, a defendant must come within the terms of the applicable statute. Abney v. United States, supra.

The cases cited by appellant are based on 28 U.S.C. §1291, and have no application to state court appeals. We adhere to our view that under §14-3-330 (1976) a criminal defendant may not appeal until after sentence has been imposed.

Appellant's motion for stay of the sentencing proceeding is denied. The appeal is dismissed without prejudice to appellant's right to raise these issues on appeal from final judgment. We express no opinion on the merits of appellant's double jeopardy claim.

s/J. B. Ness C.J.

s/George T. Gregory A.J.

s/David W. Harwell A.J.

s/A. Lee Chandler A.J.

s/Ernest A. Finney A.J.

Columbia, South Carolina

February 11, 1986

Supreme Court, U.S.
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MAY 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985

No. 85-1673 (2)

ROBERT GORDON MILLER, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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QUESTION PRESENTED

Whether this Court has appellate jurisdiction pursuant to 28 U.S.C. §1257(3) to review a decision of a state supreme court which is based on independent and adequate state law grounds?

INDEX

	Page
Table of Authorities ----------	iii
Opinion Below ----------	1
Jurisdiction ----------	1
Question Presented ----------	2
Argument ----------	2
Conclusion ----------	15

TABLE OF AUTHORITIES

	Page
CASES:	
Abney v. United States, 431 U.S. 651 (1977)	11,12
Arizona v. Rumsey, 467 U.S. 203 (1984)	12,13
Bullington v. Missouri, 451 U.S. 430 (1981	12,13
Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633 (1985)	6,10
Chander v. Florida, 449 U.S. 560 (1981)	8
Estelle v. Borough, 420 U.S. 534 (1975)	11
Ex parte Murray, 261 S.C. 255, 199 S.E.2d 718 (1973)	6
Flynt v. Ohio, 451 U.S. 619 (1981)	11
Henry v. Mississippi, 379 U.S. 443 (1964), reh. denied, 380 U.S. 926 (1965)	8,10
Michigan v. Tyler, 436 U.S. 499 (1978)	8
State v. Burbage, 51 S.C. 284, 28 S.E. 937 (1898)	7,9

Page

State v. Dingle, 279 S.C. 278, 306 S.E.2d 223 (1983) ------- 6

State v. Gellis, 158 S.C. 471, 155 S.E. 849 (1930) --------- 7

State v. Hightower, 33 S.C. 598, 11 S.E. 579 (1890) ---------- 7

State v. Hill, 74 S.C. 415, 545 S.E. 614 (1906) --------- 5

State v. Hubbard, 277 S.C. 568, 290 S.E.2d 817 (1982) ------- 6

State v. Mason, 54 S.C. 240, 32 S.E. 357 (1899) ---------- 7

State v. McKettrick, 13 S.C. 439 (1880) ---------- 7

State v. McMillan, 189 S.C. 444, 1 S.E.2d 626 (1939) --------- 7

State v. Miller, ___ S.C. ___, 337 S.E.2d 883 (1985) ------- 3,4

State v. Parker, 267 S.C. 317, 227 S.E.2d 677 (1976) ------- 6

State v. Robinson, ___ S.C. ___, 337 S.E.2d 204 (1985) ------- 6

State v. Turner, 118 S.C. 383, 110 S.E. 525 (1922) --------- 7

	Page
State v. Washington, ___ S.C. ___, 330 S.E.2d 289 (1985) -------	6,11
State v. Wyatt, 115 S.C. 325, 105 S.E. 70 (1921) ----------	5,11
United States v. Wilson, 420 U.S. 332 (1975) ----------	9
STATUTES:	
28 U.S.C. §1257(3) ----------	2,14
28 U.S.C. §1291 ----------	11
§14-3-330, Code of Laws of South Carolina (1976, as amended) --	6,11
§16-3-20, Code of Laws of South Carolina (Supp. 1984) -------	4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985

No. 85-1673

ROBERT GORDON MILLER, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Per Curium Order of the South Carolina Supreme Court dated February 11, 1986, is reproduced in Petitioner's Appendix to Petition for Writ of Certiorari.

JURISDICTION

The Order of the South Carolina Supreme Court was entered on February

11, 1986. This Court's jurisdiction was invoked by Petitioner pursuant to 28 U.S.C. §1257(3). Respondent respectfully maintains that for the reasons discussed herein Petitioner has not satisfied the burden of proof in establishing this Court's appellate jurisdiction.

QUESTION PRESENTED

Does this Court have appellate jurisdiction pursuant to 28 U.S.C. §1257(3) to review a decision of a state supreme court which is based on independent and adequate state law grounds?

ARGUMENT

Petitioner was charged in state court with murder, housebreaking and larceny and the State sought the death penalty. When the State rested its case during the guilt phase, Petitioner moved for a directed verdict of acquittal. He

claimed the State had not presented sufficient evidence placing Petitioner at the scene of the crimes. (Tr. p. 420, line 13 - p. 450, line 7).

Rather than ruling on Petitioner's motion, the trial judge took the motion under advisement and left the question of Petitioner's guilt or innocence to the jury. (Tr. p. 450, line 8 - p. 451, line 9). The jury returned a guilty verdict as to all charges. Thereafter, the trial judge granted Petitioner's motion for a judgment of acquittal notwithstanding the verdict. (Tr. p. 455, lines 13-19; Tr. p. 459, line 14 - p. 461, line 16).

The State then appealed. In State v. Miller, ___ S.C. ___, 337 S.E.2d 883 (1985), the South Carolina Supreme Court reversed the trial judge as to the murder and larceny counts. The court

held that because there was competent evidence to sustain the jury's verdict as to these charges, the trial judge erred by substituting his judgment for the jury verdict. It thereafter reinstated the conviction for murder and larceny. Id. at ___, 337 S.E.2d at 885-886. The court remanded the case for sentencing pursuant to §16-3-20, Code of Laws of South Carolina (Supp. 1984).

Petitioner next petitioned that court for a rehearing. The court denied the petition, however, without addressing Petitioner's double jeopardy argument. Following remand, Petitioner made a motion before the trial judge on the ground of double jeopardy for an order staying the sentencing proceeding and dismissing the State's notice of intent to seek the death penalty. The trial

judge denied the motion and Petitioner appealed to the South Carolina Supreme Court.

In its February 11, 1986, Order, the court held that under South Carolina law, an order denying a double jeopardy claim is not immediately appealable. See also State v. Wyatt, 115 S.C. 325, 105 S.E. 70 (1921); State v. Hill, 74 S.C. 415, 545 S.E. 614 (1906). The court expressly held that:

> The appeal is dismissed without prejudice to appellant's right to raise these issues on appeal from final judgment. We express no opinion on the merits of appellant's double jeopardy claims.

(Emphasis added).

Thus, it is clear that the order which Petitioner asks this Court to review was decided upon the basis of South Carolina procedural law. C.f., Caldwell v. Mississippi, ___ U.S. ___,

105 S.Ct. 2633, 2639 (1985) (claimed procedural law must actually be relied upon). A criminal defendant in South Carolina may not appeal until sentence has been imposed. See §14-3-330, Code of Laws of South Carolina (1976, as amended). See also, e.g., State v. Washington, ___ S.C. ___, 330 S.E.2d 289 (1985); State v. Robinson, ___ S.C. ___, 337 S.E.2d 204 (1985) (trial in absence, appeal prior to sentence); State v. Dingle, 279 S.C. 278, 306 S.E.2d 223 (1983) (order committing defendant to Department of Mental Health); State v. Hubbard, 277 S.C. 568, 290 S.E.2d 817 (1982) (denial of motion to suppress evidence); State v. Parker, 267 S.C. 317, 227 S.E.2d 677 (1976) (denial of motion to quash indictment); Ex parte Murray, 261 S.C. 255, 199 S.E.2d 718 (1973) (adjudication of delinquency, but

withholding disposition); State v. McMillan, 189 S.C. 444, 1 S.E.2d 626 (1939) (denial of motion to quash indictment); State v. Gellis, 158 S.C. 471, 155 S.E. 849 (1930) (overruling demurrer to an indictment); State v. Turner, 118 S.C. 383, 110 S.E. 525 (1922) (denial of motion to quash indictment); State v. Mason, 54 S.C. 240, 32 S.E. 357 (1899) (denial of motion to quash indictment); State v. Burbage, 51 S.C. 284, 28 S.E. 937 (1898) (denial of plea in abatement); State v. Hightower, 33 S.C. 598, 11 S.E. 579 (1890) (appeal prior to imposition of sealed sentence); State v. McKettrick, 13 S.C. 439 (1880) (appeal after conviction, trial judge refused to sentence).

This Court has no supervisory jurisdiction over state courts. Chander

v. Florida, 449 U.S. 560, 570 (1981). Therefore, the Court will decline to review state court decisions which rest upon independent and adequate state grounds. Henry v. Mississippi, 379 U.S. 443, 446 (1964), reh. denied, 380 U.S. 926 (1965). In Michigan v. Tyler, 436 U.S. 499 (1978), the Court cited Henry v. Mississippi, supra, and stated "[f]ailure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." Id. at 512, n.7.

It is respectfully submitted that South Carolina has a legitimate interest in enforcing the rule prohibiting appeals in criminal cases until such time as sentence is imposed. As the

South Carolina Supreme Court explained in State v. Burbage, supra:

> It is a bad practice, and generally condemned, to have appeals by piecemeal, especially in criminal cases: for it is destructive of the prompt administration of justice, which is so essential to the peace of society. Besides, it leads to an unnecessary consumption of the time of this court, which could be much better employed than in considering or determining questions which may never become of any practical importance in a given case.

51 S.C. at ___, 28 S.E. at 938.

Petitioner, in fact, points out the validity of this legitimate interest by his admission that if the South Carolina Supreme Court had "done no more than ... remanded the case for imposition of a sentence other than death, petitioner would concede ... this case would be controlled by United States v. Wilson, 420 U.S. 332 (1975)." Therefore,

Petitioner admits that if any sentence other than death is imposed, there is no double jeopardy problems, and an appeal as to that issue would not be warranted. (Brief of Petitioner, p. 17). Respondent would submit that this interest does not lose its legitimacy simply because there is a possibility the Petitioner may be sentenced to death.[1]

Further unlike the situation in Caldwell v. Mississippi, supra, and Henry v. Mississippi, supra, Petitioner may still present his alleged double jeopardy violation to the South Carolina

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[1] Because of the obvious importance of all death penalty cases and the amount of time and effort necessary to prepare for the sentencing phase in this particular case, Respondent would respectfully request that this Court expedite its consideration of the case.

Supreme Court. See State v. Washington, supra; State v. Wyatt, supra. See also, Abney v. United States, 431 U.S. 651 (1977); C.f., Flynt v. Ohio, 451 U.S. 619 (1981) (finality in context of criminal prosecution, finality of judgment for purposes of Supreme Court review is normally defined by imposition of sentence.)

Nor has this Court created a federal constitutional right to appeal denial of a double jeopardy claim by a state court prior to imposition of sentence. There is no federal constitutional right to appellate review of a criminal conviction. That right is conferred by statute. Abney v. United States, supra; Estelle v. Borough, 420 U.S. 534 (1975). See also §14-3-330, Code of Laws of South Carolina (1976, as amended); 28 U.S.C. §1291. To exercise

this statutory right, a defendant must meet the requirements of the applicable statute. Abney v. United States, supra.

In support of his argument, Petitioner cites Bullington v. Missouri, 451 U.S. 430 (1981) and Arizona v. Rumsey, 467 U.S. 203 (1984). Neither of these cases, however, has recognized the proposition that a denial of a double jeopardy claim may be appealed prior to imposition of sentence. In both cases, the defendants were found guilty of murder in the guilt phase of a bifurcated trial, then each underwent a sentencing proceeding wherein they were given life imprisonment. The defendant in Rumsey was sentenced to death on remand following an appeal of the original sentence. In Bullington, the Supreme Court of Missouri issued a writ of prohibition holding the double

jeopardy clause did not bar imposition of the death penalty when defendant had been successful in his motion for a new trial. In both cases, this Court held that imposition of the death penalty at the second sentencing proceedings was barred by the double jeopardy clause. Neither case, however, gives a defendant the right to appeal prior to a sentence being imposed in the first instance.

Moreover, the present situation is readily distinguishable because Petitioner has never been sentenced, though convicted by the jury at his first trial. Thus, unlike Rumsey and Bullington, the proceeding on remand involves his original sentencing proceeding.

Therefore, it is respectfully submitted that this Court does not have appellate jurisdiction pursuant to 28

U.S.C. §1257(3) to review the decision of which Petitioner complains. The February 11, 1986, Order of the South Carolina Supreme Court was decided solely upon the basis of state procedural law and this provides an independent and adequate ground barring review by this Court.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1673

ROBERT GORDON MILLER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari to the Horry County Court of General Sessions

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REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY 1

CONCLUSION 6

TABLE OF AUTHORITIES

CASES	Page
Abney v. United States, 431 U.S. 651 (1977)	2, 3
Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984)	2
Smalis v. Pennsylvania, 476 U.S. ___, 39 Cr.L. 3079 (1986)	2, 3, 4, 5
State v. Miller, ___ S.C. ___, 337 S.E.2d 883 (1985)	3
STATUTES	
28 U.S.C. §1257(3)	2, 3
OTHER AUTHORITIES	
Stern, Gressman & Shapiro, Supreme Court Practice (6th ed. 1986)	4

REPLY BRIEF FOR PETITIONER

Robert Gordon Miller (Petitioner) submits this reply to the arguments presented by the State of South Carolina in its brief in opposition to the petition for a writ of certiorari to the Horry County Court of General Sessions.

ARGUMENT IN REPLY

I.

The respondent state of South Carolina has opposed issuance of the writ solely on the basis of its claim that the unavailability of pretrial appellate review of double jeopardy claims by South Carolina criminal defendants constitutes an adequate state ground in support of the judgment below and deprives this Court of jurisdiction to consider petitioner's double jeopardy claim. This argument ignores the firmly-

established principle that a denial of a pretrial double jeopardy plea is a "final judgment" subject to immediate review by this Court under 28 U.S.C. §1257(3). Smalis v. Pennsylvania, 467 U.S. ___, 39 Cr.L. 3079, 3080 n. 4 (1986); Abney v. United States, 431 U.S. 651, 661-662 (1977).[1]

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[1] In Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 302-303 (1984), the Court explained the reasons why a pretrial denial of a double jeopardy claim must be regarded as a final judgment for purposes of federal review.

> We should keep in mind in this respect the unique nature of the double jeopardy right. In Abney v. United States, 431 U.S. 651 (1977), the Court held that denial of a motion to dismiss an indictment on double jeopardy grounds constitutes a final order for purposes of 28 U.S.C. §1291. That decision was based on the special nature of the double jeopardy right and the recognition that the right cannot be fully vindicated on appeal following final judgment, since in part the Double Jeopardy Clause protects "against being twice put to trial for the same offense." Id., at 661 (emphasis in original).

The fact that South Carolina law does not provide pretrial appellate review of such claims, State v. Miller, ___ S.C. ___, 337 S.E.2d 883 (1985), means nothing more than that the decision of the trial court denying petitioner's pretrial double jeopardy claim was under South Carolina law the judgment "by the highest court . . . in which a decision could be had." 28 U.S.C. §1257. Because the "finality" of the trial court's judgment derives from the nature of the constitutional guarantee against double jeopardy itself, Smalis v. Pennsylvania, supra, Abney v. United States, supra, it cannot be vitiated by the refusal of the state supreme court to entertain the merits of petitioner's constitutional claim until after he has already been wrongfully forced to undergo a second trial proceeding. The only effect on this Court's jurisdiction of

the state supreme court's dismissal of petitioner's pretrial appeal is that the writ of certiorari lies to the Horry County Court of General Sessions rather than to the South Carolina Supreme Court, and the present petition has been captioned and styled accordingly. See Stern, Gressman & Shapiro, Supreme Court Practice 139-141 (6th ed. 1986).

II.

On the merits of his double jeopardy submission, petitioner would note the very recent holding of this Court in Smalis v. Pennsylvania, supra, that "the Double Jeopardy Clause bars an appeal [of a judgment of acquittal] not only when it might result in a second trial, but also if reversal would translate into further proceedings devoted to the resolution of factual issues going to the elements of the offense charged."

Petitioner submits that Smalis supports his contention that his acquittal by the trial judge, albeit erroneous, bars the state from requiring him to undergo further trial proceedings at a sentencing hearing devoted to the resolution of many of the same factual issues previously decided in his favor at trial.

CONCLUSION

For the foregoing reasons and for those set forth in his petition for writ of certiorari previously filed in this Court, petitioner submits that the writ should be granted.

Respectfully submitted,

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